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NEWSLETTER

(Number 87 – September 2012)

Vital statistics:

CAP determination July 2012:	R199716
CPI year-on-year July 2012	4,9%
RSA long bond yield August 2012:	7,5%
Real rate of return (7,5-4,9):	2,6%
ABSA Property Index August 2012:	-4,6% real
Houses less than 140 square meters	-16,3% real

The injured widow: I was recently asked to comment on the following scenario:
A man died in an accident. His widow was severely injured in the same accident and has been in a coma since then. They were both working at the time of the accident. The widow is no longer working and has received the following payouts:

1. provident fund disability lump sum from her employer;
2. disability payout from a private Sanlam policy.
3. UIF payout.

Is it correct to say that the Assessment of Damages Act 9 of 1969 only exempts benefits paid on the death on the husband? If so then these benefits received by the widow as a result of her disability are not exempted?

I replied: In *Evins v Shield* 1980 2 SA 814 (A) it was ruled that the claim for loss of support due to the death of a breadwinner is a separate action from the claim for loss of earnings. It follows that the claim by the injured widow for loss of support must be calculated as though she had not been injured. She then has a separate claim for loss of earnings for which the disability payouts may or may not be relevant depending on the rules for collateral benefits. The Assessment of Damages Act applies only to death claims and has no application to claims for loss of earnings. The rulings in *Dippenaar v Shield Insurance*1979 2 SA 904 (A), *Santam v Byleveldt* 1973 2 SA 146 (A), and *Zysset v Santam* 1996 1 SA 273 (C) are relevant to the claim for loss of earnings.

Application of the "CAP": In *Sil v RAF* 2012 (SGH) (unreported 11.06/2012 case 2011/18773) the following observations were made about the application of the CAP:

> "…the purpose of the cap is to limit merely the sum to be paid, and its purpose is not to interfere in the calculation of the loss, the contingencies are part of the exercise in calculating actual loss, and must therefore have already been dealt with before the capping is applied".
>
> "…moreover to the extent that the subsection consciously recognises that a person who has suffered loss is not to be compensated in full, it stands to reason that a restrictive interpretation is appropriate".

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The above dicta support the CAP-application methodology which I proposed in my Newsletter 81 March 2011:

> "It is common that lump-sum benefits need to be added or deducted, such as disability lump-sums for injured claimants, and inheritances for the dependants of a deceased victim. The CAP legislation is silent as to how to deal with this type of problem. An elegant solution would be to determine the lump sum damages payable had there been no CAP legislation and then to spread this amount as a series of equivalent level payments over the lifetime of the claimant. The CAP is then applied to this notional yearly loss. The same can be done with death claims, the total loss for all dependants being spread over the lifetime of the surviving parent, or the longest period of dependency when there are only child claimants".

Inheritance by children: In *MacDonald v RAF* (453/2011) [2012] ZASCA 69 (24 May 2012) it was ruled that when making a deduction for inheritance from claims for loss of support:

> "…it matters not … whether the income thus available would come to the dependants directly from the deceased breadwinner's estate or indirectly through the medium of a trust".
>
> The usual two-parts-one-part actuarial method of apportionment was rejected on the grounds that "… we know the actual amount that was required for the appellants after the death of their parents (R1,97 million)".
>
> "(By reason of the Assessment of Damages Act 9 of 1969) one should ignore the insurance policy and enquire whether there is (still) sufficient non-insurance money in the estate (or trust) to meet the … maintenance needs of the dependants".

If what remains amounts to R1,97 million then the deduction for the dependants is R1,97 million and the claims of the children are nil. If what remains is less than R1,97 million then the lesser amount will be deducted and the children will have claims. In *Lambrakis v Santam* 2000 3 SA 1098 (W), 2002 3 SA 710 (SCA) it was ruled that 100% of the inheritance of a healthy child must be deducted by way of accelerated benefit.

It follows from the above reasoning that the deductions for executor's fees and estate duty should be adjusted downward to what they would have been had there been no life insurance payment.

The Court also took it for granted that the values of the estate assets should be the higher values realised on the sale thereof and not the values as recorded in the estate accounts (see too *Santam v Meredith* 1990 4 SA 265 (Tk)).

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